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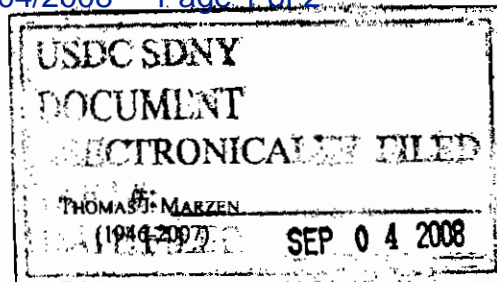
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MEMO ENDORSED

September 3, 2008

Honorable Laura Taylor Swain
United States District Judge
United States Courthouse
500 Pearl Street
New York, New York

Re: Ognibene v. Parkes
08 CV 1335 (LTS) (TDK)

Plaintiffs' Request for Sur Reply

By Facsimile Transmission: 212-805-0426

Dear Judge Swain:

We represent the plaintiffs in Ognibene v. Parkes (08 CV 1335). Yesterday, after speaking with Mr. Jon Pines, counsel for the defendants, we faxed a letter to Your Honor asking for leave to file a sur reply. We incorporate that letter here by reference.

Mr. Pines sent us an email last night expressing reservations regarding our sur reply request and indicating a copy would be furnished to the Court this morning. While we had been in dialogue with opposing counsel, in the interest of appraising the Court of all aspects of this dispute we now submit this letter, furnishing a copy concurrently to Mr. Pines.

In his letter, which Mr. Pines indicated would be delivered to the Court this morning, he alleges that we, the counsel for the plaintiffs, misled him. This is a serious accusation. We write to (1) object to that characterization and (2) ask that Your Honor either allow us to file a sur reply or else strike defendants' reply brief for being improper, as well as too long.

Plaintiffs' Counsel Did Not Mislead Mr. Pines

When I spoke with Mr. Pines yesterday, I indicated to him our desire to file a sur reply. I explained to him that if your Honor allows us that reply, we will (a) explain that we agree with the

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defendants that *Randall*-type claims, requiring the plaintiffs to develop a factual record, are not properly before the Court at this stage of the litigation, but that (b) Count II of plaintiffs' amended complaint involves more than *Randall*-type claims, and so it is properly before the Court. I also explained to Mr. Pines that I would not address those points in the letter, prior to Your Honor granting permission for us to file a sur reply. I also explained that, in order to ask for a sur reply, we would have to provide Your Honor some basis for granting it. I was true to my word. Plaintiffs' letter (1) asked for leave to file a sur reply; (2) did *not* address the issues we will discuss in the sur reply (if Your Honor grants us leave to file one); and (3) gave Your Honor a basis for granting our request, by pointing out that Part 6 of their brief is improper. Far from misleading Mr. Pines, we did what we said we would do.

Your Honor Should Strike Defendants' Reply Brief;
In The Alternative, She Should Grant Plaintiffs Leave To File a Sur Reply

It is not only Part 6 of the defendants' brief that is improper. Actually, much if not all of their brief is an argument against plaintiffs' request for final judgment stemming from their preliminary injunction motion. As such, it is an improper reply and should be stricken. Additionally, the brief is longer than the ten pages Your Honor allows for reply briefs. While both sides requested and received leave to exceed the page limit for previous briefs, no such request was made for this one. It should therefore be stricken.

In the alternative, for the reasons we stated in our letter yesterday, the Court should grant plaintiffs leave to file a sur reply addressing only the narrow issue of whether Count II is properly before this Court at this stage of the litigation.

Sincerely,

BOPP, COLESON & BOSTROM

James Bopp Jr.
James Bopp, Jr.
Joe La Rue

Plaintiffs may file a sur-reply by September 8, 2008. Defendants may file a sur-sur reply by September 12, 2008.

c: Jon Pines, Esq. (by email)
Counsel for Defendants

Charles Capetanakis, Esq. (by email)
Local Counsel for Plaintiffs

Mark Spund, Esq. (by email)
Local Counsel for Plaintiffs

These briefs must be limited to the Count II Randall issue described in the parties' correspondence and shall not exceed 6 pages in length (12 pt type throughout, including footnotes, and 1" margins).

SO ORDERED.

NEW YORK, NY

Sept 4, 2008
LAURA TAYLOR SWAIN
UNITED STATES DISTRICT JUDGE